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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 13109 Civil

REPUBLIC PICTURES CORPORATION,
Appellant,

vs.

FRANCIS KAPPLER,
Appellee

JURISDICTIONAL STATEMENT

Nature of the Case

This was an action brought by the plaintiff-appellee against Republic Pictures Corporation for overtime pay under an employment which terminated May 15, 1943.

The plaintiff commenced his action on September 8, 1944.

The defendant defended on the ground that plaintiff's action was barred by Chapter 267, Laws of the 50th General Assembly of Iowa which became effective March 23, 1943, and provided as follows:

> Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal Statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1,

1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943.

The foregoing statute is found in the official bound volume of the Laws of the 50th General Assembly of the State of Iowa, at pages 269, 270 and is designated as Senate File 43.

The trial court held the Iowa statute was void as violative of the Supremacy clause of the Constitution of the United States. Appended hereto, marked Exhibit "A" is a copy of the opinion of the trial court. Upon appeal to the United States Circuit Court of Appeals, Eighth Circuit the judgment of the trial court was affirmed (Sanborn, Judge dissenting). Appended hereto, marked Exhibit "B", is a copy of the majority opinion of the Circuit Court of Appeals holding the statute in question to be invalid because it violated the Constitution of the United States, and a copy of the dissenting opinion by Sanborn, Judge.

Jurisdictional Statute

The jurisdiction of the Supreme Court of the United States is based upon Article III of the Constitution of the United States and Title 28, U. S. C. A., Section 347 providing in part as follows:

> 347 (b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

The appellant shows that the date of the judgment or decree sought to be reviewed is October 29, 1945, and thereafter appellant filed a timely petition for rehearing and that rehearing thereof was denied by the Circuit Court of Appeals for the Eighth Circuit on November 26, 1945.

A. A. McLaughlin,
E. D. Perry,
Robt. J. Bannister,
E. B. Carpenter,
Paul Ahlers,
As Attorneys for Appellant,
Republic Pictures Corporation.

Authorities

A Case in Which a State Statute Has Been Held Invalid Under the Federal Constitution by the Circuit Court of Appeals, Lies Within the Direct Appellate Jurisdiction of the Supreme Court.

Section 240(b) Judicial Code, 28 U. S. C. A. 347.

Bradford Electric Light Co. Inc. v. *Clapper, Admrx.*, 1931, 284 U. S. 221, 52 S. Ct. 8.

EXHIBIT "A."

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISON

No. 338—Civil

FRANCIS KAPPLER, Plaintiff,

vs.

REPUBLIC PICTURES CORPORATION, Defendant

Memorandum Opinion With Findings of Fact and Conclusions of Law

Filed February 8, 1945

This action came on for hearing in open court at Des Moines, Iowa, on its merits on the 19th day of January, 1945. Evidence was introduced and the case submitted on written arguments. The action is to recover for overtime pay as provided by the Fair Labor Standards Act of 1938 (Title 29, Section 201 et seq., U. S. Code).

Plaintiff entered the employ of the defendant corporation in February 1941, being employed by Mr. Moran, branch manager of the Des Moines office, and continued in this employment until June 1943.

Defendant is a corporation engaged in the moving picture business with its principal place of business in New York City. It maintains a branch distributing agency in Des Moines, Iowa, and it has owned, possessed, marketed and shipped moving picture merchandise to points in the State of Iowa and to points outside of the State of Iowa. There are about 10 people employed at Des Moines, including the plaintiff, the salesmen and the district manager. After the films are shipped to Des Moines from New York and New Jersey they are sold to exhibitors by the salesmen within and without the State of Iowa.

The duty and employment of the plaintiff was what is known as a booker. It was his duty to book the pictures on the dates that the pictures would fit into the booking

situation in the local office and it was his duty to see that the films were kept in uniform order and see that they were booked in proper order so that the films reached the exhibitors in time for their theater use and that the films were returned on time or would be forwarded to other points as might be necessary, and to more or less establish a booking arrangement in the sequence in which the pictures are released and more or less assist in completing the contractual obligation of the exhibitor. He also had to see that the pictures were forwarded by the exhibitor to the next exhibitor or returned to Des Moines. He was not directly engaged in their transportation in the sense that he had personal physical contact with the goods but directed the transportation companies and other agencies in whose hands they might be to deliver them at a particular time to appointed places. This was done by telephone, telegraph and correspondence through the mails.

The question for determination is whether under this situation the plaintiff is engaged in interstate commerce or in the production of goods for interstate commerce to bring him within the provisions of the statute.

From the decisions on this question we know that the Act is not co-extensive with the limits of the power of Congress over commerce; further, that there is no dependable touchstone to determine whether employees are "engaged in commerce;" the problem is one of drawing lines. *Kirschbaum* v. *Walling*, 316 U. S. 517.

The lines are to be drawn after "an analysis of the various types of transactions and the particular course of the business • • •" *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

It is the work of the particular employee and not the business of the employer which controls. *McLeod* v. *Threlkeld*, 319 U. S. 491. And the burden of proof is on the employee to show that he personally is either engaged in commerce or his work is necessary for the production of goods for interstate commerce. *Schwarz* v. *Wilwer Grocer Co.*, 141 F. 2d 341; *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699. The evidence does not indicate that the plaintiff's duties were necessary to produce moving

picture or films and the plaintiff does not therefore come within the rule that his work was necessary for the production of goods for commerce. *Western Union Tel. Co.* v. *Lenroot*, —— U. S. —— (Jan. 8, 1945).

The question for determination therefore is narrowed to whether the plaintiff has shown by a fair preponderance of the evidence that he was engaged in interstate commerce. And he must show that a substantial portion of his activities related to goods moving in the channels of interstate commerce. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 562, 572.

"The test to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.

"And in that connection closeness depends upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce. • • • If a cessation of the services of the employee causes an interruption or interference with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof." *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636, 638.

While as stated above, there is no dependable touchstone to determine whether employees are engaged in commerce, the Supreme Court of the United States in the case of *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, held that a rate clerk working for a transportation company was engaged in commerce within the meaning of the Act and I can see little difference between the duties of a rate clerk in that case and the duties of the plaintiff here as a booking agent who keeps track of the goods being transported in interstate commerce and directs their destination. See also *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, where one of petitioners sold and collected toll tickets.

Defendant seriously contends that as the goods were shipped to Iowa and were sold from the Iowa office they

had come to rest in Iowa and that the plaintiff has failed to prove that a substantial portion of his activities related to goods moving in the channels of interstate commerce. The evidence of the plaintiff was that from the Des Moines office the prints of the films were shipped generally to points in Iowa and other offices and accounts outside of the State. And there is no evidence as to the proportion of the films that were shipped from the Iowa office to points outside of the State.

The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in a state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564. The defendant overlooks however the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third person. The branch office at Des Moines was a distributing agent for the defendant and the contracts of sale to exhibitors must have been sales by the corporation.

Under this situation the goods did not come to rest in Iowa but the interstate character of the transportation continued until the goods were in the hands of the exhibitors and, even then, they only stopped temporarily, as the goods were licensed and not sold, and the transportation continued until after all of the exhibitors had used them when they were returned to Des Moines and probably back to New York City. In any event the goods did not come to rest from the time of the initial shipment from New York and New Jersey until after they were used by the exhibitors, so that all of the duties of the plaintiff insofar as they related to the prints of these films were in interstate commerce. Binderup v. Pathe Exchange, 263 U. S. 291, 309; DeLoach v. Crowley's Inc., 128 F. 2d 378, 379; Walling v. Jacksonville Paper Co., 317 U. S. 564, 568.

The defendant contends, also, that even if the plaintiff was engaged in interstate commerce that the defendant never consented to his working in excess of 40 hours a week but, on the contrary, plaintiff was advised that it was the

policy of the company that he was to be employed during office hours aggregating 40 hours a week and that the company would not recognize any claims for overtime. Following out this policy of the company and by direction of the superintendent a directive was issued to all of the employees in the branch office at Des Moines, which was initialed as being received and understood by such employees, including this plaintiff, which reads as follows:

"Sept. 22, 1941

From F. R. Moran
To All Employees.

Effective this date we will use a daily time record, and each of you have the responsibility of setting down the time of your arrival at the office in the morning, when you leave for your lunch period, when you return, and again when you leave in the evening.

The office hours, as you know, are from 8:30 a. m. to 4:45 p. m. with an hour for lunch on week days, and from 8:30 a. m. to 12:15 p. m. on Saturdays. It is also to be understood that there is to be no overtime unless the proper approval is secured from either Mr. Adair or myself.

I can not stress the importance of this record being kept up to date at all times too strongly, therefore, to assure me that each of you thoroughly understand the above instructions, kindly initial this letter, which will indicate to me your full and complete understanding.

F. R. Moran."

The evidence establishes that Mr. Moran knew of the overtime being worked by plaintiff and made no objection thereto but in fact cooperated with the plaintiff in his overtime work. Under this situation I am satisfied that this claim of avoidance cannot prevail. There are many cases determining that the parties can not by contract limit the scope and effect of the congressional enactment and I think the statement in the recent case of Katharine F. Lenroot v. Interstate Bakeries Corpn., — F. 2d. —, (8 C. C. A., decided Jan. 2, 1945), is sufficient on the point here raised. In that case it is said:

"• • • the mandate of the statute is directed to the employer and 'he may not escape it by delegating it to others.' The 'duty rests on the employer to enquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him • • • the duty must be held personal, or we nullify the statute • • • '. 'The cases must be rare where prohibited work can be done within the plant and knowledge or the consequences of knowledge avoided.' "

While the court in this case was discussing the provision of the Act having to do with child labor violations by subordinates, it appears to be equally pertinent to the provisions of the statute under discussion here. It will also be noted that in the directive set out above permission for overtime could be granted by Mr. Moran, who was the very person who knew of the overtime work being done by the plaintiff.

The final major defense is that the action is barred by the statute of limitations of the State of Iowa. That statute reads as follows:

"Sec. 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943." Chap. 267, 50th G. A. Iowa, 1943.

It will be noted that this is a very peculiar statute as it is not a general statute of limitations but it directed only to the provisions of federal statutes. It has been established by decisions of the Supreme Court of the United States ever since the time of John Marshall that acts of the Congress of the United States are supreme within the sphere

of the delegated authority to the United States government. The legislature of the State of Iowa had no more right therefore to tack on this provision to the federal statutes than a city would have by ordinance to add a provision to acts of the state legislature. It is not a question of constitutionality, but it is an attempt on the part of the legislature of the State of Iowa to enter a field of legislation exclusively within the authority of the Congress of the United States. It is true that where there is no limitation of time in which a federal statute can be enforced the federal judiciary turns to the general statute of limitations of a state to determine the question of laches. But this rule and these decisions have nothing to do with the determination of the question of whether the legislature of the State of Iowa had a right or authority to add to federal statutes provisions with reference to limitations on the time when actions might be maintained thereon. Congress only has such right, power and authority and the State cannot regulate and determine the time when actions may be brought under federal statutes in the State of Iowa.

Plaintiff kept a daily record of the time employed in his duties and I can find no reason to challenge his statement of the number of hours of work that he performed.

The question of what constitutes and how to determine "the regular rate at which he is employed," has its difficulties. The statute does not provide that an employee is to be paid time and a half for each hour he works over 40 hours a week but time and a half of "the regular rate at which he is employed." So if a person is employed not for any particular hours but at a regular rate of pay for his weekly or hourly work the "regular rate" would be the total number of hours he worked in each week or month. Overnight Motor Co. v. Missel, 316 U. S. 572; Walling v. Belo Corpn., 316 U. S. 624. But if his "regular rate" is based upon an agreed 40 hours a week rate then he is entitled to straight time and a half for all overtime. United States v. Townsley, — U. S. — (decided Jan. 15, 1945.).

We have to determine therefore what was the "regular rate" of the plaintiff in this case. I have read and reread the transcript and I am satisfied with the following conclusions:

At the time plaintiff was first employed there was nothing said about the number of hours that he was to work for his weekly wage of $35. However, on account of the extra hours that he was working he took the matter up with the manager as to what should be done about payment for overtime and the manager in turn took the question up with the home office in New York City. Mr. Moran sometime in June or July, 1941, was then advised by the New York office—"that they wanted overtime kept at a minimum and, if necessary, hire additional people to do the work." Mr. Moran, following out what he considered were the directions from the home office, then prepared and served upon each employee in the Des Moines office the written directive dated Sept. 22, 1941, which is set out in full above.

From the evidence, therefore, I conclude that from and after Sept. 22, 1941, the defendant determined and put in force a policy that the weekly wage of the employees was to be for a 40-hour week only. In figuring the amount of the plaintiff's overtime therefore, his regular rate must be determined on the full amount of the hours that he worked prior to Sept. 22, 1941, and at a rate based on 40 hours a week after that time.

I therefore make the following findings of fact and conclusions of law.

Findings of Fact

1st. I find that the plaintiff was an employee of the defendant from February 1941 to June 1943.

2nd. That the original contract of employment did not specify and there was no agreement as to the number of hours which plaintiff was to work in any one week, but on Sept. 22, 1941, the defendant notified all its employees at Des Moines that from and after that date their employment was for a 40-hour week.

3d. That the defendant was during the time of such employment engaged in the moving picture business and owned, possessed, marketed and shipped moving picture films from New York and New Jersey to points in the State of Iowa and to points outside of the State of Iowa.

4th. That plaintiff's employment during this period, and substantially for all of his time, was as a booker of these

films after they had been sold to exhibitors within the area of the Des Moines branch, and his activities were so closely related to the interstate transportation of these goods as to be a part thereof.

5th. That the intervener, Erma Jean Schultz, did not appear and introduced no evidence and her intervention should be dismissed for want of prosecution with prejudice.

Conclusions of Law

1. That the petition of intervention of Erma Jean Schultz should be and the same is hereby dismissed with prejudice for want of prosecution.

2. That plaintiff was during the time of his employment engaged in interstate commerce and that the principal part of his activities was in such employment.

3. That all of the goods and films shipped from New York and New Jersey into the State of Iowa continued in the stream of interstate commerce while they were in the State and during the time that plaintiff's activities had to do with and were a part of such shipments.

4. That the plaintiff, Francis Kappler, is entitled to overtime pay from February 1941 to Sept. 22, 1941, to be computed according to the method set out in Missel v. Overnight Motor Trans. Co., 126 F. 2d 98, at 110. Overnight Motor Co. v. Missel, 316 U. S. 572. Walling v. Belo Corp., 316 U. S. 624.

5. That the plaintiff, Francis Kappler, is entitled to overtime compensation at the rate of straight time and one-half for the hours which he worked over and above 40 hours a week from Sept. 22, 1941, to June 1943. See United States v. Townsley, — U. S. — (decided Jan. 15, 1945).

6. That plaintiff is also entitled to liquidated damages as provided by statute. Sec. 216 (b), Title 29, U. S. C.

7. That plaintiff is entitled to the relief demanded as determined above, with judgment against the defendant for costs and an attorney's fee in the sum of $300.

8. That the statute relied upon by the defendant of the State of Iowa as a statute of limitations is ineffective as being an attempt by the State legislature to invoke powers belonging exclusively to the Congress of the United States.

9. That the policy of the defendant to employ the plaintiff for specific hours at a specific weekly wage with directions to its employees not to work overtime, even though known to the plaintiff, did not affect the right of the plaintiff to rely upon the Fair Labor Standards Act to recover for overtime.

10. The attorneys for plaintiff may prepare a judgment entry in conformity with the foregoing findings of fact and conclusions of law.

11. Defendant's motion made at the close of all the evidence to dismiss is overruled.

To each and every finding of fact and conclusion of law the defendant and plaintiff except.

Signed at Des Moines, Iowa, this 8th day of February, 1945.

Sgd. CHAS A. DEWEY,
United States District Judge.

EXHIBIT "B"

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 13,109

REPUBLIC PICTURES CORPORATION, *Appellant,*

vs.

FRANCIS KAPPLER, *Appellee*

Appeal from the District Court of the United States for the Southern District of Iowa

(October 29, 1945)

Mr. Paul Ahlers (Mr. E. D. Perry, Mr. Robert J. Bannister and Mr. E. B. Carpenter were with him on the brief) for Appellant.

Mr. Walter F. Maley (Mr. Ted E. Hartung was with him on the brief) for Appellee.

Before Gardner, Sanborn and Thomas, Circuit Judges

GARDNER, *Circuit Judge*, delivered the opinion of the Court.

This was an action brought by appellee as plaintiff to recover for overtime pay, under the provisions of the Fair Labor Standards Act of 1938 (Title 29, U. S. C. A., Sec. 201 et seq.), for a period of time between February, 1941, and June, 1943. He was employed by the manager of the Iowa state branch of Republic Pictures Corporation, at its Des Moines office. At all times here material defendant was engaged in the moving picture business, with its principal place of business in New York City. It maintained a branch distributing agency at Des Moines, Iowa, and it owned, handled, possessed, marketed and shipped moving picture films to points both in the State of Iowa, and to points outside of that state. After the films were shipped from either New York or New Jersey to Des Moines, Iowa, they were leased or sold to exhibitors within and without the State of Iowa. Defendant employed about ten people, including plaintiff, at its branch office in Des Moines. Plaintiff was known as a booker, and it was his duty to book the films shipped from New York and New Jersey on the dates the pictures would fit into the booking situation, and it was his duty to see that the films were kept in uniform order, and to see that they were booked in proper order so that the films reached the exhibitors in time for their theater use and to see that the films were returned on time so as to be forwarded to other points designated by him, and to establish a booking arrangement fixing the sequence in which pictures were released, and to assist in handling and keeping the contractual obligations of the exhibitor with defendant. He also had to see that the films were forwarded by the exhibitor to the next nearest exhibitor leasing or renting the films, or arrange for their return to the branch office at Des Moines. He directed the transportation companies and other agencies to whom the films might be delivered for transportation to the points designated. This directing work was done largely by telephone, telegraph, and through the

mails. The trial court concluded as a matter of law, "That plaintiff was during the time of his employment engaged in interstate commerce and that the principal part of his activities was in such employment."

As an affirmative defense defendant pleaded a special statute of limitations limiting time for commencing actions on claims arising pursuant to any federal statute to a period of six months after the accrual of such claim. The action was commenced in September, 1944, more than six months after its accrual, but the trial court held the state statute of limitations ineffectual as being an attempt by the state to invoke power belonging exclusively to the federal government.

On this appeal defendant contends, as it contended in the trial court, that (1) plaintiff was not engaged in commerce; (2) the Iowa statute of limitations bars recovery.

Defendant admits that it is engaged in interstate commerce, but it denies that the evidence shows that plaintiff was so engaged. It admits too that plaintiff's activities are necessary to its interstate commerce.

Section 6 of the Fair Labor Standards Act of 1938 (Title 29 U. S. C. A., Sec. 206), provides for the payment of minimum wages to employees "engaged in commerce or in the production of goods for commerce." Section 3 of the Act (Title 29 U. S. C. A., Sec. 203), defines commerce as follows:

> " 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

The same section of the Act provides that for the purposes of the Act "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Plaintiff does not contend that he was engaged in the actual production of goods for commerce. As has been

observed, he kept records which were essential to the movements of the goods of the employer in commerce. It must be conceded that the test as to whether an employee is engaged in commerce is somewhat more exacting than the test as to whether his occupation is necessary to production for commerce. *Armour & Company* v. *Wantock*, 323 U. S. 126. The words, however, should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. *Overstreet v. North Shore Corp.*, 318 U. S. 123. The practical test to be applied is whether, without the particular service, interstate commerce would be impeded or abated. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; *Overstreet v. North Shore Corp., supra.* Great remoteness, however, renders the act inapplicable. *McLeod* v. *Threlkeld*, 319 U. S. 491. Such cases as *Fox Film Corp.* v. *Trumbull, D. C. Conn.*, 7 F. 2d 715, involving the power of a state to regulate or tax the exhibition of moving picture films brought into the state through interstate commerce have, we think, no bearing here on the question of the meaning of a federal statute passed by Congress in the exercise of its control over interstate commerce. As said by the Supreme Court in *Binderup* v. *Pathe Exchange*, 263 U. S. 291,

> "It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause."

In adopting the Fair Labor Standards Act of 1938, Congress clearly indicated its purpose to leave local business to the protection and regulation of the state, but a mere temporary break in the interstate transportation of goods by placing them in a warehouse awaiting final delivery, or, as in the instant case, a series of deliveries and transmission to and from the place of temporary rest, does not remove the goods from commerce within the meaning of the Act. *Walling, etc.* v. *Jacksonville Paper Co.*, 317 U. S. 564. As said in the last cited case,

> "• • • if the halt in the movement of the goods is a convenient intermediate step in the process of

> getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended."

Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other parts of Iowa and other states. Plaintiff's contact with and participation in interstate commerce were substantial. His services were essential to the movement of commerce and hence, he was engaged in commerce within the meaning of the Act. *United States* v. *Darby*, 312 U. S. 100; *Schmidt* v. *Peoples Telephone Union*, 8 Cir., 138 F. 2d 13.

Was plaintiff's action barred by the Iowa special statute of limitations? The statute relied upon is embodied in Section 1, Chapter 267, Acts of the 50th General Assembly, which became effective March 23, 1943. This section reads as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any federal statute wherein no period of limitation is prescribed, the holders of such claim or cause of action may commence action therein within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

The Fair Labor Standards Act contains no provision limiting the time for commencing actions thereunder. Ordinarily, in the absence of legislation by Congress, the courts of the United States apply the statute of limitations

of the state in law actions. The state statutes of limitations are considered as rules of decision and binding on federal courts. Thus, in the absence of a provision in the federal statute prescribing a limitation, the statute of the particular state in which the action may be brought is applicable to an action to enforce a liability under a particular statute. *Payne* v. *Ostrus*, 8 Cir., 50 F. 2d 1039; *Chicago & N. W. Ry. Co.* v. *Ziebarth*, 8 Cir., 245 F. 334; *Harrison* v. *Remington Paper Co.*, 8 Cir., 140 F. 385; *Rawlings, Receiver* v. *Ray*, 312 U. S. 96; *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154.

Section 725, Title 28, U. S. C. A. provides that,

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

By virtue of this statute a state statute of limitations was held controlling in the above cited cases. The adjudicated cases which apply the state statute of limitations in a federal court action are those in which a general statute of the state has been held to be applicable to the particular cause of action, the language of which was so general that all similar cases were included. In the instant case, the statute applies only to those claims or causes of action created or growing out of federal statutes. It arbitrarily singles out all actions involving the assertion of rights created by or flowing from an act of Congress. The general Iowa statute of limitations (C. 487, Code 1939), prescribing the time within which actions may be brought contains nine separate classes of actions. The classifications referring to contracts fix the limitations as follows: on written contracts, ten years; on contracts not in writing and accounts, five years.

A state may not discriminate against rights accruing under federal laws. *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230; *Pufahl* v. *Estate of Parks*, 299 U. S. 217. Except the special statute directed at the causes of action arising under federal law, every other limitation on an action

at law or suit in equity in the Iowa statutes is directed at the nature of the claim asserted without reference to the authority which creates the right asserted. This is a discrimination against the United States. The action for overtime under the statute is an action on contract; at least, the federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co.* v. *Broutin*, 6 Cir., 133 F. 2d 628,

> "The federal statute is premised upon the existence of an employment contract * * *. * * * The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

Were it not for the fact that plaintiff's right can be traced to a federal statute he could have brought his action in five years after its accrual if his contract were not written or he could have brought it in ten years if it were written. His claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment of a claim arising under a federal statute in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. As said by the Supreme Court in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94,

> "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

While the sphere of sovereignty of the federal government is a limited one, yet its power over the subjects committed to it is full and complete and its laws are "The Supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding." (Art. 6, U. S. Constitution). As a federal right is here involved, the state can not justify a discrimination against such right. *Miles* v. *Illinois Central RR. Co.*, 315 U. S. 698.

In *Pufahl* v. *Estate of Parks, supra*, an action was brought in a state court by the receiver of a national bank to recover stockholders' liability under a federal statute. Hold-

ing that the receiver was governed by the law of the forum with respect to the marshaling of assets, priority of distribution, etc., the court said,

> "This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute * * *; it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action." (Italics supplied).

See, also, *Campbell* v. *Haverhill*, 155 U. S. 610.

Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitation for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violates Article 6 of the Constitution in that "it discriminates against rights arising under federal laws." *McKnett* v. *St. Louis & S. F. Ry. Co., supra.* Its enforcement would result in denying to those seeking to assert such claims, the equal protection of the law. (14th Amendment, Constitution, Sec. 1). Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination.

We conclude that this special statute of limitations can not be enforced in federal Court. The judgment appealed from is therefore affirmed.

Plaintiff asks for the allowance of attorney fees on this appeal. The trial court allowed him $300.00 as compensation for his attorneys in the trial court. An attorney fee of $250.00 on this appeal is hereby allowed.

SANBORN, *Circuit Judge*, dissenting:

In my opinion, there is no adequate basis for ruling that the Iowa statute of limitations in suit is unconstitutional. In enacting the Fair Labor Standards Act, Congress saw

fit to omit a provision limiting the time within which rights created by the Act might be asserted. Congress could, no doubt, have required that claims based upon the statute should be barred after six months from the time of their accrual. Since the Act fails to prescribe any period of limitations, each state, I think, is at liberty to fix the time within which actions to enforce rights granted by the Act shall be commenced.

This is clearly an action to enforce a right created by a federal statute which prescribes no period of limitation, and the action, therefore, comes within the purview of the Iowa statute of limitations in suit. Compare, *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348, and *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

A statute of limitations does not take away any right of action, but merely limits the time within which the right may be asserted. *Turner* v. *New York*, 168 U. S. 90, 94; *Mattson v. Department of Labor*, 293 U. S. 151, 155. In other words, such a statute does not impair any substantive right, but affects only the time within which the remedy to enforce it shall be available. "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection." *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 562. See and compare, *Terry v. Anderson*, 95 U. S. 628, 633; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 77; *Mills v. Scott*, 99 U. S. 25, 27; *Vance* v. *Vance*, 108 U. S. 514, 520-521; *Turner v. New York*, *supra*, page 94 of 168 U. S.; *Wilson v. Iseminger*, 185 U. S. 55, 62-63; *United States v. Morena*, 245 U. S. 392, 397; *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 258 U. S. 190, 196-197; 34 Am. Jur., pages 27-33.

The plaintiff had no vested interest in a particular limitation, and the legislature of Iowa could prescribe a limitation where none existed before or could change one already established, "provided adequate means of enforcing the right remain." *Terry v. Anderson, supra*, page 633 of 95 U. S.

I have found no case involving the question of the validity of a statute of limitations, in which the Supreme Court of the United States has concerned itself with the propriety or fairness of the basis adopted by a state legislature for classifying causes of action. Statutes of limitation are, in their nature, necessarily somewhat arbitrary and discriminatory. There seems to be no provision in the Federal Constitution which prohibits a State from providing a special period of limitation for a cause of action of a certain kind or for a designated class of actions, so long as the time allowed is sufficient to permit enforcement of substantive rights. I think that the time allowed by the statute of limitations in suit cannot, as a matter of law, be said to be so short as to invalidate the statute. Compare, *Turner v. New York, supra,* page 94 of 168 U. S., and *Mills v. Scott, supra,* page 27 of 99 U. S.

In *Eggen v. Canadian Northern Ry. Co.,* 8 Cir., 255 F. 937, this Court, with one judge dissenting, held that a statute of limitations of the State of Minnesota was discriminatory and therefore unconstitutional. In doing so, it relied upon general language found in cases which did not involve the precise questions. Judge Hook, who dissented, referred to this in his dissenting opinion in that case page 940 of 255 F.). The Supreme Court reversed this Court, in 252 U. S. 553. While the Eggen case did not raise the same question of discrimination which is presented here, that case discloses the hazards involved in ruling that state statutes of limitation are unconstitutional on the ground that they are discriminatory.

Since I can find no sufficient justification for ruling that the Iowa statute of limitations in suit is violative of the Constitution of the United States, I respectfully dissent from so much of the majority opinion as holds to the contrary.

A true copy. Attest:

Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.